91-390

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1991

DAVID A. NORDSTROM,

Petitioner,

vs.

LINDA E. NORDSTROM,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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(a)

QUESTIONS PRESENTED FOR REVIEW

The questions before this Court are (1) whether the courts of the State of Washington may reopen long settled property divisions of military retired members (as a class singularly discriminated against in Washington) in the case before the Court, in spite of federal and state Constitutional and statutory prohibitions. These acts of the courts of the State of Washington center on retrospective application of PL 97-252, codified as 10 U.S. C. 1408, and commonly known as the Former Spouse Protection Act (hereafter FSPA); (2) whether the courts of the State of Washington may recharacterize military retired pay as "deferred compensation" or a "pension", as opposed to the correct federal definition of this pay as "wages", the issue this Court

declined to decide in the case of McCarty v. McCarty, infra, and which this Court MUST NOW DECIDE; and underlying each of the above, (3) whether the FSPA was unconstitutional as an impermissible delegation of exclusive Congressional authority and responsibility, and the corollary issues of the impairment of contractual rights and expectations by retroactive application of subsequent legislation to a final judgment not appealed, and the involuntary servitude imposed as a result thereof.

(b)

LIST OF PARTIES TO THE PROCEEDINGS

At this time there are no additional parties to these proceedings.

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(d)

REFERENCE TO OFFICIAL AND UNOFFICIAL ORDERS

There are five orders entered in the courts below, as follows:

1. The Findings of Fact, Conclusions of Law and Decree of Dissolution entered by the trial court August 15, 1980, as set out in full in Appendix A.

2. The Order re: Clarification of Military Retirement, upon Findings of Fact and Conclusions of Law made by a court Commissioner, entered on August 29, 1989, as set out in full in Appendix B.

3. The Order re: Clarification of Military Retirement upon Findings of Fact and Conclusions of Law made by a superior court judge, upon motion for revision of commissioner's ruling, entered November 21, 1989 as set out in full in Appendix C.

4. The Opinion of the Court of

Appeals Division III,entered February 26, 1991, as set out in full in Appendix D. (unpublished opinion)

5. The Order denying Petition for Review by the Washington State Supreme Court, entered June 4, 1991, as set out in full in Appendix E.

(e)

GROUNDS FOR JURISDICTION

i. Date of Judgment and time of entry

The judgment sought to be reviewed is the judgment of the Supreme Court of the State of Washington, signed and entered on June 4, 1991, which affirmed without comment or published opinion the judgment of the Court of Appeals, Division III, dated February 26, 1991, also an unpublished opinion, the last ruling on this case.

ii. Date of Order on Rehearing

There was no request for or ruling on rehearing in this case.

iii. Cross Petitions pursuant to Rule 19.5

This is a first petition, and cross petitions have not been filed.

iv. Statutory provisions conferring jurisdiction upon this Court

This action involves a challenge to the constitutionality of 10 U.S.C. 1408. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a), and this Court's decisions in United States v. Tyler, 105 U.S. 244 (1881); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); Bell v. United States, 366 U.S. 393 (1961); McCarty v. McCarty, 453 U.S. 210 (1981); United States v. Larionoff, 431 U.S. 864 (1977); Costello v. United States, 442 U.S. 929 (1979), and Mansell v. Mansell, 490 U.S. 581, (1989).

(f)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The Constitutional provisions involved in this case are Constitution of the United States, Article 1, section 8; Article I, section 9; Article I section 10; Article VI, clause 2; and the Fifth, Thirteenth and Fourteenth Amendments thereto, all of which have been set out in full in the Appendices, as Appendix L. The statutory provisions involved are Title 10 United States Code, specifically 10 U.S.C. 101 (27); 10 U.S.C. 267; 10 U.S.C. 276; 10 U.S.C. 672; 10 U.S.C. 688 which have been set out in full in the appendixces as Appendix M, and 10 U.S.C. 1408, which has been set out in full in the Appendices, as Appendix F and Appendix G. Other than corollary reference, there are no known regulations,treaties or ordinances involved in this action.

STATEMENT OF THE CASE

The parties to this action were married in May, 1961, and were permanently separated in February 1979. Petitioner herein was inducted into the United States Air Force on December 15, 1961. On August 15, 1980, the Court entered the Findings of Fact and Conclusions of Law, and Decree of Dissolution following trial on the matter, on a then agreed to document approved by counsel for both parties. That Decree was not appealed, and became final and binding upon the parties on September 14, 1980.

On February 1, 1983, Title 10, section 1408 of the federal code, known as the FSPA came into effect. That statute was not retroactive in viola-

tion of the ex-post facto restriction of the Constitution, nor was it ever intended to be retroactive as the 1990 Congressional Record (Appendix H) and the letter to the Petitioner from a member of the United States Senate to the Petitioner herein indicate (Appendix I), but was merely an attempt (an impermissible delegation of Congressional authority as will be discussed later), to partially remove the preemption of consideration of military retired/retainer pay as property, as had been the existing law of the land since 1882, U.S. v. Tyler, infra, and as this Court reaffirmed in the McCarty v. McCarty decision, infra. The Former Spouses' Protection Act, applied retroactively, was the statute upon which jurisdiction in this action was predicated.

Nearly nine years following the entry of the original Decree of Dissolution, the Respondent filed a motion

to reopen the Decree of Dissolution for the stated purpose of clarifying the Decree as to the Appellant's military retired pay, the very retroactive application of law prohibited by the law itself and the Constitution of the United States.

The matter was heard by a Court Commissioner on July 24, 1989, and upon Findings of Fact and Conclusions of Law entered an order effectively modifying the Decree of Dissolution on August 29, 1989. That decision was timely noted for revision of the commissioner's ruling by a judge, and a hearing thereon was held on October 26, 1989. Upon Findings of Fact and Conclusions of Law, an Order denying revision of the commissioner's ruling was entered on November 21, 1989.

The trial court's final order was timely appealed to the Court of Appeals on December 13, 1989. The trial court invented an ambiguity in the Decree of

Dissolution. The Court of Appeals did not find an ambiguity, but invented conditions to support an otherwise erroneous decision of the lower court. The Washington State Supreme Court simply refused to act, refused to correct obviously erroneous decisions.

The trial court and the Court of Appeals ignored the argument of Petitioner as to the proper characterization of military retired/retainer pay and failed to properly address the application of Washington State statutory law, specifically R.C.W. 6.15.020 (formerly R.C.W. 6.16.030).

The Court of Appeals made an unsupported and erroneous finding that the Constitutional challenge made by the Petitioner had been previously decided. The Court of Appeals affirmed the decision of the trial court which concluded that the court should clarify an unambiguous divorce decree, contrary to the express language therein, the

express intent of the parties, Constitutional prohibitions, and the FSPA.

The Court of Appeals decision of February 26, 1991, summarily avoided the Constitutionality issue, and cited the wrong authority in so doing. Similarly, the Court of Appeals correctly stated and then misapplied prior definitive law as to the nature of the language in the original Decree of Dissolution. The Court of Appeals also misstated Petitioner's argument as to the nature of the characterization of military retired/retainer pay and misapplied existing Washington State statutory law. That opinion was timely noted for review in the Washington State Supreme Court on March 27, 1991.

The Supreme Court of the State summarily denied review of the decision of the Court of Appeals, Division III, which was filed on February 26, 1991, which remains the last definitive ruling in this case, in keeping with

the pattern in the State of Washington to discriminate against the military member whenever possible. The judgment of the Washington State Supreme Court was entered on June 4, 1991. Notice of Petition for Writ of Certiorari to this Court was filed in the Supreme Court of the State of Washington, the court possessed of the record herein, on August 30, 1989.

The only alleged jurisdiction over the subject matter of this action rests on an unconstitutional Federal Statute. The Washington courts consistently and categorically ignore federal statutes and case law established by this Court, much as the California courts simply ignored this courts ruling in Mansell v. Mansell, 490 U.S. 581, 104 L.Ed.2d 675, 109 S.Ct. 2023 (1989). The Washington courts, when it comes to the class of persons known as military retirees, consistently and categorically speaks in alternative terms,

depending upon the situation. Military retired pay is pay, for purposes of avoiding RCW 6.16.020, and then is not pay, but a pension, for the purposes of avoiding RCW 26.16.140.

This Petition is docketed within ninety days of the entry of the order denying review by the Supreme Court of the State. As this action involves a direct constitutional challenge to an Act of Congress, 28 U.S.C. 2403 (a) may apply, and this Petition is being served on the Solicitor General of the United States.

(h)

STATE OF PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE PRESENTED

The question of the interpretation of federal law respecting the character of military retired pay; the question as to the constitutionality of the FSPA in its entirety; the question of the constitutionality of retroactive appli-

cation of that statute; the question of the violation of the Constitutional restrictions impairing contract; and the denial of the courts jurisdiction, were argued in written brief in all forums below, and in oral argument in all forums in which argument was allowed. In the court of first instance, the court commissioner would not permit oral argument on any constitutionality issues, as was true in all forums below, with initial admonitions after reviewing briefs, that the constitutional issues have already been settled. Similarly, the jurisdictional challenge is summarily dismissed, as the courts base jurisdiction on the FSPA, and not allowing a challenge to the FSPA itself, dispose of any basis to argue subject matter jurisdiction. The court of first instance invented an ambiguity to avoid the retoactivity issue. The Court of appeals invented conditions not present nor intended, to

avoid the retroactivity issue. This matter is critically important. The very morale and support of the Armed Forces is at stake. In McCarty, this Court did not decide the issue of whether the states had authority to recharacterize retired pay from the federal definition and statutory basis of "current" compensation, i.e. pay, to their own definition of "deferred" compensation, i.e. pension, as the situation dictated, and then being able to call it pay, or wages, in other contexts. THAT QUESTION NEEDS AN ANSWER!

This dual characterization cannot continue. This Court can, and must set this matter to rest.

(i)

FEDERAL JURISDICTION

This case originates in state court, and the federal courts below have not had jurisdiction.

ARGUMENT

1. The Courts Below Erred in Finding Retrospectively a Divisible Property Right in Petitioner's Future Military Retired Pay, and in Awarding 50% Thereof to the Respondent in Spite of the Unambiguous Language in the 1980 Decree. That Ruling is Clearly Erroneous and Must be Reversed.

   a. The Courts Below Erred in its 1989 Finding that the Law Governing the Original Decree in ths Case Entered in 1980, was a Statute Enacted in 1983, in Violation of both the United States and the Washington State Constitutions.

On August 14, 1980, the parties finalized their Decree of Dissolution, the purpose of which was to effect a final and complete settlement all of their rights, including their property rights. That document was signed by the Counsel for the Respondent herein and speaks for itself, and was a binding final document that forever set to rest the issues of division of property

between these litigants.

On February 1, 1983, the FSPA came into effect. That statute was not retroactive in violation of the ex-post facto restriction of the Constitution, but was merely an attempt (an impermissible delegation of congressional authority as discussed below), to remove the pre-emption of consideration of military retired/retainer pay established by the McCarty v. McCarty decision, 453 U.S. 210, 69 L.Ed 2d 589, 101 S.Ct 2728 (1981), and is the statute upon which Respondent's action was predicated. Even were that statute constitutional and permissible, when it came into effect in February, 1983, it did not speak to, nor negate a legally binding two and one-half (2 1/2) year old final contract between the parties.

(1) The Decree of Dissolution was Clearly Unambiguous.

The decree of dissolution in this case was entered by the Court on August

15, 1980. That decree, in pertinent part states at page 6 (Appendix A-10, paragraph VI):

> VI.
> That the parties have already divided the community property and the property shall remain with the party holding the same. Petitioner's future military retirement shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment, subject to the result of any decision reached by the United States Supreme Court. However if it adopts the rulings of Hisquerdo v. Hisquerdo, 99 S.Ct. 802 (January, 1979, then the pension shall revert in its entirety to Petitioner. (Emphasis added).

This Court did adopt the ruling of Hisquerdo v. Hisquerdo, 439 U.S. 572, 59 L.Ed.2d 1, 99 S.Ct. 802 (1979) in McCarty v. McCarty, supra. That condition subsequent having been met, the military retired pay (erroneously denominated as a pension), reverted in its entirety to Petitioner, David A. Nordstrom.

The language of the decree of dis-

solution is clear. If the United States Supreme Court adopted the ruling of Hisquerdo as it did in McCarty, then the "pension" reverted in its entirety to Petitioner, David A. Nordstrom. Further, the courts of the State of Washington, or any other state have no jurisdiction over matters concerning a military member, absent compliance with the Soldiers and Sailors Civil Relief Act, 50 U.S.C. 501. That act was not complied with.

Upon the occurrance of the condition subsequent, the resulting decree simply reads in paragraph VI as:

> That the parties have already divided the community property, and the property shall remain with the party holding the same. Petitioner's future military retirement... shall revert in its entirety to Petitioner.

That language was not and is not ambiguous. That language was intended to finalize this action with knowledge of the impending change. The decree

was not intended to permit one of the other of the parties to come back and upset a final settlement of property.

If this Court were to read each possible condition, this Court will find that Washington did adopt the Hisquerdo ruling. Larango v. Larango, 93 Wash. 2d 460, 610 P.2d 907 (1980). The pension plan was not upheld, and in fact, Washington then specifically stated that the courts do error in classifying military retired pay as community property and in dividing it. In Re Marriage of Dessauer, 97 Wash. 2d 831, 650 P.2d 1099 (1982). The fact that the Dessauer ruling was overruled, albeit erroneously, in Matter of Marriage of Smith, 100 Wash. 2d 319, 669 P.2d 448 (1983), (post FSPA) did not negate the ruling as to the Dessauer case itself, or anything retrospective, including this case. The Smith ruling could only operate as to Smith and prospectively. The fact

that the FSPA (although unconstitutional), purports to overrule a portion of McCarty, does not negate the ruling of McCarty as to the McCarty case itself, or anything retrospective, including this case. It to could only operate prospectively. United States Constitution, Article I, sec. 9.

The language in paragraph VI of the decree is clear, and refers directly to this Court. Washington has long recognized the danger of permitting relitigation of single issues (except in practice as applied to military retirees). Flannagan v. Flannagan, 42 Wash.App. 214, 709 P.2d 1247 (1985). It is well settled that where the Settlement Agreement is not modifiable, the trial court lacks jurisdiction to modify the agreement/order of the court. Byrne v. Ackerlund, 108 Wash. 2d. 445, 739 P.2d 1138 (1987); Shaffer v. Shaffer, 47 Wash.App. 189, 733 P.2d 1013 (1987). The record and file in

this case show that the character and future possible existence of military retired pay was considered in 1980. The parties entered into an agreement, ordered and endorsed by the court, and the final decree was entered, stating:

> That the parties have already divided the community property and the property shall remain with the party holding same. Petitioner's future military retirement shall be divided equally between the parties subject to the Washington State Supreme Court upholding the pension plan assignment, subject to the result of any decision reached by the United States Supreme Court. However, if it adopts the rulings of Hisquierdo v. Hisquierdo, 99 S.Ct. 802 (January, 1979), then the pension shall revert in its entirety to Petitioner.

Once this Court adopted the rulings of Hisquerdo, as it specifically did in McCarty, the operative portions of that decree, fully anticipated by both parties as one of two possible results, can only be read as "Petitioner's future military retirement ...shall revert in its entirety to

Petitioner." Such agreements are not subject to modification under Washington State case law. McGill v. Hill, 31 Wash.App. 542, 644 P.2d 680 (1982); Millheisler v. Millheisler, 43 Wash.2d 282, 261 P.2d 69 (1953); Kinne v. Kinne, 82 Wash.2d 360, 510 P.2d 814 (1973).

Even Flannagan v. Flannagan, supra, relied upon by the Respondent establishes parameters. That case required that reopening, under facts unique to that case (no agreement and no legal counsel), be (1) within a reasonable time, and (2) the movant must allege facts that if proven would demonstrate that the division was unfair or inequitable because of the McCarty decision, supra. No such allegation was made in this action. The action was not brought within a reasonable time - nine years. The parties did have a binding agreement. Both parties had legal counsel. The

agreement was fair. The judgment entered upon that agreement was, and is controlling by its own terms.

b. Retroactive application of the FSPA acts as a forfeiture and is repugnant to the federal and state Constitutions.

This action is intended to interfere with, and destroy, alleged property rights. This is repugnant to case law and the United States Constitution, Art. I, section 10, Allied Structural Steel Co. v.Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978); Energy Reserves v. Kansas Power & Light, 459 U.S. 400, 74 L.Ed.2d 569, 103 S.Ct. 697 (1983).

On August 14, 1980, Petitioner had no vested contractual right to military retired pay, nor does he have such a vested right today. By virtue of the final Decree of Dissolution, drawn by competent legal counsel, and accepted by both parties, any and all interest

there may have been in future military retired/retainer pay (erroneously listed as a "pension"), was fully awarded to the Petitioner, upon the occurance of a condition subsequent, and for the state courts to take legislative action through judicial action as was done in this case, significantly impaired Petitioner's right to receive future wages free of servitude, and is unconstitutional under the United States Constitution, Article I, section 10. The contract clause is applicable to the states through the Fourteenth Amendment, and is reiterated in the Washington State Constitution, Art. I, sec. 23.

Retroactive application of FSPA violates the United States Constitution and case law which prohibit laws that impair vested property rights. The FSPA was not intended to be retroactive to apply to dissolution decrees which became final during the so called

"window" period between the time McCarty was decided on June 26, 1981, and the date FSPA became effective on February 1, 1983, let alone retroactive to any final order of a date prior to June 26, 1981. The Congressional record shows that Congress considered making FSPA fully retroactive, but did not, Legislative History, P.L. 97-252, Senate Report No. 97-502, pp. 1599-1600. Such legislative was suscinctly restated in 1990 during work on P.L. 101-_____, amending the FSPA. Legislative History, P.L. 101-_____, House Report p. 12194.

The Washington courts should not have permitted retroactive application of FSPA to undo a valid and final judgment, and violate long settled legal principles and holdings of this Court.

In Hodges v. Snyder, 261 U.S. 600, 603, 67 L.Ed. 819, 43 S.Ct. 435 (1923), this Court stated:

> [T]he private rights of parties which have been vested by the judgment of a court cannot be

> taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. (Citing Pennsylvania v. Wheeling Bridge Co., 18 How. 421, 429; The Clinton Bridge, 10 Wall. 454, 463; United States v. Klein, 13 Wall. 128, 146; McCullough v. Virginia, 172 U.S. 102, [43 L.Ed 382].

Again, in McCullough, this court stated:

> Legislation may act on subsequent proceedings, may abate actions pending but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases. McCullough, supra, at 123-124 (1898).

Washington State courts in interpreting the Washington State Constitution, Article I, section 23, have held that the impairment of contractural obligations prohibitions in the State Constitution are substantially the same as the federal provisions, and must be given the same effect. Washington Federation of State Employees, AFL-CIO, Council 28 AFSCME v. State, 101 Wash.2d 536, 682 P.2d 689 (1984).

While all retrospective acts are not, per se, ex post facto, those that impose penalties or forfeitures are. Locke v. New Orleans, 4 Wall 172, 71 U.S. 172, 18 L.Ed. 334 (1866). Here the State of Washington imposes a forfeiture on Petitioner's future wages, under color of the FSPA, an unconstitutional act, and in direct violation of the Thirteenth Amendment. Military personnel contract to obey, to defend, to serve their country, but not to be in servitude for the remainder of their lives to other than their country.

Under Washington State law, statutes may not be given retroactive effect, regardless of legislative intent, where the effect would interfere with vested rights, impair obligations of contract or deprive a person of property without due process of law. Gillis v. King County, 42 Wash.2d 373, 255 P.2d 546 (1953); Hearde v.

City of Seattle, 26 Wash.App 219, 611 P.2d 1375 (1980). A statute impairs the obligation of contract if it diminishes the value in any degree. Seattle v. O'Brien, 86 Wash.2d 339, 544 P.2d 729 (1976). Legislative action impairs the obligation of contract if it directly, or indirectly, lessens values or alters terms. Ruano v. Spellman, 81 Wash.2d 820, 505 P.2d 447 (1973). Statutes enacted subsequent to the date of a lawful judgment cannot operate retrospectively to set aside, annul or change liability on the judgment. Waymire v. Waymire, 10 Wash. App. 262, 517 P.2d 219 (1973).

Washington State courts have interpreted the State Constitution per these principles, except in the case of military retirees. What the courts below did in Petitioner's case in 1989 was to rewrite paragraph VI of the 9 year old decree, by deleting everything in that paragraph after "... divided

equally between the parties." In so doing, they have ignored this Court, and the Constituions of both the State and the United States. The courts cannot rewrite a agreement of the parties. Marriage of Mudgett, 41 Wash. App. 337, 341, 704 P.2d 169 (1985).

(c) The Court of Appeals, after requesting and receiving supplementary materials that reaffirmed that the FSPA was not intended to be applied retroactively, did an end run by creating a "condition precedent" that did not exist, and which was, by the court's own definition, not a condition precedent. That ruling is clearly erroneous and must be reversed.

The Court of Appeals cited Marriage of MacDonald, 104 Wash.2d 745, 709 P.2d 1196 (1985) as controlling on the issue of retroactive application. That holding has been overridden by the Congress of the United States in the amendments to the FSPA and the accompanying legislative history which were

provided to the Court of Appeals, materials which clearly state as the Court of Appeals recognized, that the FSPA was never intended to be retroactive (see Appendix H). Notwithstanding, MacDonald is clearly distinguishable from the present case, both on its own facts, and applying the rationale of Marriage of Giroux, infra.

In MacDonald, supra, the service member was retired, and the trial court applied federal law as it understood it to be at that time. The Court of Appeals heard that case during the appeal period, before the case became final and binding on the parties. In the present case, the Petitioner was not eligible to retire until December, 1981, and the Decree was not appealed. The courts below heard the present case well outside the parameters of MacDonald, and the ruling of the Court of Appeals that MacDonald controls the present case is unfounded in law or in

fact.

Even assuming that there was a "property" right, which Petitioner specifically denies, this case is factually distinguishable from In Re the Marriage of Giroux, 41 Wash. App. 315, 704 P.2d 160 (1985). In Giroux, the Decree of Dissolution was concurred in by the former spouse only under protest on the specific issue of the alleged value of the military retired pay. The husband in that case had already "retired" from active duty. There was a contested issue, a difference in the expectations of the parties. In Giroux the court addressed retroactivity in a totally different context. The court stated in Giroux at page 319:

> However, to determine the constitutionality of retroactive legislation, the proper inquiry is not whether vested rights have been interfered with, but whether 'settled expectations honestly arrived at with respect to substantial interests' will be defeated.

2 C. Sands, Statutory Construction, sec. 41.05, at 261 (4th ed. 1973).

The parties in Giroux clearly had differing expectations. The appellants attorney so indicated when he signed the Decree "under protest". Id at 317. In the Petitioner's case, there were no differing expectations. The parties sought to finalize the action by allowing for and anticipating either a restatement of existing law as then understood, or a rejection of that law in the upcoming McCarty, supra, decision.

Applying the test in Giroux, supra, to Petitioner's case, settled expectations, honestly arrived at with respect to substantial interests, have been defeated by the courts below, by falacious reasoning and invention, unfounded in law or in fact. The Court of Appeals used the definitions contained in Fleming v. August, 48 Wash.2d 131, 291 P.2d 639 (1955), in defining

conditions precedent and subsequent.

The Court then invented a "condition precedent" where none existed, in spite of that accepted definition. A "condition precedent must be a condition precedent to the contract becoming a valid obligation and not merely precedent to its payment." Fleming, supra, at 135. (Emphasis added). In Petitioner's case there was a valid binding contract, final and unappealed, that had only a condition precedent to payment - Mr. Nordstrom's retirement. By the Court of Appeals own definition, this does not rise to a "condition precedent".

There was clearly a condition subsequent, and it was clearly met. The Decree of Dissolution, signed by counsel for both parties and approved without reservation by counsel for the Respondent, stated that

> Petitioners future military retirement shall be divided equally between the parties... subject to the result of any decision reached by the United

States Supreme Court. However, if it adopts the rulings of Hisquerdo v. Hisquerdo, 99 S.Ct. 802 (January 1979), then the pension shall revert in its entirety to Petitioner.

That language is clear and unambiguous. It clearly anticipated the upcoming decision in McCarty, supra, as all members of the family law bar were intimately aware of the ruling in Hisquerdo, supra, and were anticipating a definitive ruling from this Court as applied to military retired/retainer pay, as conceded by Respondent's counsel in the court of first instance upon the re-opening of this action in 1989. This Court did adopt the ruling of Hisquerdo, supra. The condition subsequent in the Decree of Dissolution in Petitioner's case was met, precisely met. The Court of Appeals, through judicial action, attempted to rewrite the Decree, to invent a condition precedent to avoid having to honor the fully satisfied condition subsequent.

(2) The Court of Appeals Combined the Alternative Arguments as to the Characterization of Military Retired/Retainer Pay, thereby Avoiding or not Addressing the Issue. In so doing, the Court of Appeals does not Consider a Decree of Dissolution or a Modification thereto as "Any Legal Process Whatever". That Decision or Lack of Decision is Clearly Erroneous and must be Reversed.

Petitioner argued that military retired/retainer pay was not property. Petitioner alleges that such pay is wages, and as such is not divisible in futuro. Petitioner also argued that even though the courts Washington State improperly characterize such future wages as a pension, then Washington State statutory law, (R.C.W. 6.15.020, formerly R.C. W. 6.16.030) specifically prohibit the division of the "pension", under "any legal process whatever." The Court of Appeals combined both alternatives into one sentence, obfuscating the issue and avoiding any intelligible answer.

As will be discussed below, Con-

gress alone has the power and authority to regulate pay for military service and to determine what constitutes military service for which compensation is required or payable. United States Constitution, Article I, section 8, Clauses 12, 13, 14, and 16. The perpetuation of the mischaracterization of retired pay as "pension" or "deferred compensation" is radically inconsistent with federal law respecting the pay.

The courts of the State of Washington have absolutely no authority to garnish or "divide" Petitioner's current pay for the benefit of another not his spouse, as a property right, as to do so would be repugnant to the Thirteenth Amendment of the Constitution of the United States, by placing Petitioner in a state of involuntary servitude. The retired/retainer pay paid to a member of the retired reserve is unassailable as a property right other than community

property, and then it only becomes "property" as it is earned. 10 U.S.C. 101(27) defines pay for all of Title 10. That section lists as "pay", inter-alia, basic pay, hazardous pay, retainer pay, retired pay and incentive pay. There are no differentiations. Each is a wage, earned day to day, and only payable after they are earned.

Congress has determined that while the military member is on an indefinite service contract with this nation, he will continue in the capacity of his "retiring" rank unless he violates the terms and conditions of his employment contract with the United States Armed Forces. Congress has expressly retained the inactive duty member and makes monthly (periodic) payments to him in consideration for his continuing (but reduced) service to the United States Armed Forces. United States v. Morton, 112 U.S. 1, 28 L.Ed 613, 5 S.Ct. 1 (1884); United States v.Mills,

197 U.S. 223, 49 L.Ed. 732, 25 S.Ct. 434, (1904); Kahn v. Anderson, 255 U.S. 1, 65 L.Ed. 469, 41 S.Ct. 224 (1920); Leonard v. United States, 279 U.S. 40, 73 L.Ed. 604, 49 S.Ct. 232 (1928); Puglisi v. United States, Ct. Cl. 1977) 564 F.2d 403 cert. den. 435 U.S. 968 (1978); Lockhart v. Mittlemann, 123 F.2d 703 (2nd Cir. 1941); Andrews v. United States, 175 Ct.Cl. 561 (1966); Chambers v. Russel, 192 F.Supp. 425 (N.D. Cal. 1961); Hooper v.Hartman, supra; United States v. Tyler, 105 U.S. 244 (1882); Costello v. United States, 587 F.2d 424 (9th Cir. 1978) cert. den. 442 U.S. 929 (1979); Watson v. Watson, 424 F.Supp. 866 (1976); Hostinsky v. United States, 292 F.2d 508, 154 Ct.Cl. 443 (1961).

For over one hundred years, the federal courts have recognized and held that in the absence of a retainer paid to the military member on inactive duty status, the United States would be

without right to subject the member to (1) continuing obligations and restrictions, or (2) recall to active duty, United States v. Tyler, supra.

Petitioner contends that the passage of FSPA did not enable state courts to retroactively recharacterize military retired pay, let alone recharacterize it at all. In United States v. Yazell, 382 U.S. 341, 15 L.Ed.2d 404, 86 S.Ct.500 (1966), this Court addressed the priority of application of state and federal law stating:

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. [Free v. Bland, 369 U.S. 663, 666 (1962); [Gibbons v. Ogden, 9 Wheat. 1, 210-211 (1824), cited with approval in Ridgway v. Ridgway, 454 U.S. 46 (1981).

The inescapable conclusion is that the state law must yield to the federal statutory schema. The retrospective division of military retired pay, par-

ticularly a purely speculative expectancy not vested or of any present value at all, as was done in this case, unconstitutionally imposes a financial burden upon Appellant, and violates both the Federal and State Constitutions.

The dual characterizations cannot co-exist; military retired pay cannot be earnings in order to compensate the "retired" member for his continuing services and be deferred compensation to provide a gratuity to the "retired" member for his past services. It is, indeed, the former, and as such is wages, earned day to day, clearly the separate property of the individual earning that wage day to day. See 26 CFR Ch.1, Sec. 31.340(a)-1(b)(1)(ii). It does not become property at all until earned and payable. The community or separate character of property is determined as at the time of its acquisition, Osicka Estate, 1

Wash.App. 277, 461 P.2d 585 (1969); Enrich v. Barton, 2 Wash.App. 954, 471 P.2d 700 (1970). Here, the "property" sought by the Respondent is not yet acquired, and, indeed, is not yet "property". The State of Indiana recently addressed the same issue, and found that for "retired or retainer pay to constitute property" the individual had to have a right to receive such pay. As is with the present case, the Court in Indiana was faced with an individual who had not yet retired at the time the dissolution was entered, therefore had no "right" to receive retired pay, therefore it was not property. In Re Marriage of Battles, 564 N.E. 565 (Ind. App. 3 Dist. 1991)

Property divisions wherein one party's wages and salary earned after the separation are awarded to the other party are disfavored as such wages are separate property. In re Marriage of Freedman, 35 Wash.App. 49, 665 P.2d 902

(1983); R.C.W. 26.16.140. Indeed, to do so places the paying party in a position of involuntary servitude, repugnant to the Thirteenth Amendment.

When the courts of the State of Washington improperly recharacterize military retired/retainer pay as "property", as a "pension", in contravention of federal statutory and case law, e.g. Wissner, supra, even then a division of that mischaracterized pay cannot be made by state law. R.C.W. 6.16 .030, as in effect at the time this action came before the courts, simply and clearly prohibited division. (See Appendix K). That statute was rewritten and recodified in 1987 as R.C. W. 6.15 .020, however, the result is identical due to the operation of federal law. To prohibit garnishment is to prohibit division. Hisquerdo, supra, at 584. Until, and only until the Congress of the United States redefines military retired pay - creates

military "pensions" - with right to payment without service; until it creates a deferred compensation system and severs the ties with the retiree, then military retired/ retainer pay remains wages - current wages for current services. If, and only if, that occurs, will the State of Washington be able to execute, attach, seize or garnish a portion of that "pension", and then only if the legislature amends R.C.W. 6.15.020 to openly discriminate against that class of federal "pensioner".

(3) The Courts Below Erred in Entering no Finding of Fact or Conclusion of Law Regarding Petitioner's Argument on the Unconstitutionality of the Former Spouses' Protection Act. That Decision, or lack of Decision, is Clearly Erroneous and must be Reversed

(a) <u>The FSPA is Unconstitutional as an Impermissible Delegation of Exclusive Congressional Authority</u>.

The Uniformed Services Former

Spouse Protection Act, codified at 10 U.S.C. 1408, hereinafter FSPA, was enacted in 1982 and became effective February 1, 1983. That act is an unconstitutional delegation of exclusive authority by Congress. Clearly, the raising and maintaining of the military is exclusively a function reserved by the United States Constitution to Congress. By virtue of the Constitutional reservation of authority to Congress, likewise, Congress may not delegate its authority.

Congress alone has the power and authority to regulate pay for military service and to determine what constitutes military service for which compensation is required or payable. United States Constitution, Article I, section 8, Clauses 12, 13, 14, and 16; United States v. Standard Oil, 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947) [holding personnel affairs/ pay subject exclusively to U.S. regula-

tions]; Free v. Bland 369 U.S. 663, 8 L.Ed.2d 180, 82 S.Ct. 1089 (1962) [holding that federal law and congressional enactments control the determination of the character of retired pay as present earnings]; McCarty v. McCarty, supra. State courts may not redefine military retired pay. Wissner v. Wissner, 338 U.S. 655, 94 L.Ed. 439, 70 S.Ct. 413 (1950).

A similar question was decided in Knickerbocker Ice Company v. Stewart, 253 U.S. 149, 64 L.Ed. 834, 40 S. Ct. 438 (1920). Congress is exclusively authorized by the Constitution to fix and address remedies for seaman injured at sea. Congress enacted legislation which provided an election of remedies for the seaman under the various laws of the various states. This Court held in that case that the delegation of power to the states which would control or affect the Congressional schema was an unconstitutional delegation of

authority by Congress.

Given similar circumstances in the case of military pay, Petitioner urges this Court to find that FSPA is likewise unconstitutional. The FSPA purports to delegate to each state the authority to "treat" the pay "in accordance with the laws of the State". This is precisely the issue laid to rest by the Supreme Court in Knickerbocker. Where the delegation abdicates to the states a power/authority granted exclusively by the Constitution to Congress, the Act is an impermissible delegation of non-delegable power.

(b) There is No "Property" in Military Retired/Retainer Pay to be Divided, and Such Entitlements are not a "Pension" or Deferred Compensation.

This Court decided in McCarty v. McCarty, supra, that military retired pay was the personal entitlement of the military member and that state courts

were preempted from dividing the pay. This Court declined in McCarty to rule on the remaining question of whether or not a state could recharacterize the pay from current earnings to deferred compensation. The time has now come to rule on this important issue. This court in McCarty did, however, confirm the characterization of more than one hundred years of federal statutory and case law, Wissner v. Wissner, supra; United States v. Tyler, 105 U.S. 244, 26 L.Ed. 985 (1882). The characterization of the pay as a "personal entitlement" and "current earnings" were valid at the time of the Superior Court's original Decree in this case. McCarty, supra, was merely a statement of what the law had always been.

The perpetuation of the mischaracterization of retired pay as "pension" or "deferred compensation" as promulgated by the bar and judiciary of the State of Washington, is radically

nconsistent with federal law respec-
ing the pay. Petitioner is under
ontract for services and is, there-
ore, an employee of the United States
ir Force, continuing to serve the
nited States Air Force as a non-com-
issioned officer on retired reserve
tatus. Petitioner was not receiving
etired pay at the time of the dis-
olution. His ability to receive
etired pay at this time is established
y federal statute. Bell v. United
tates, 366 U.S. 393, 6 L.Ed.2d 834, 40
.Ct. 438 (1961) [holding that a
oldier's entitlement to pay is
ependent upon a federal statutory
ight]; Goodley v. United States, 441
.2d 1175 (Ct.Cl. 1971); Costello v.
nited States, 587 F.2d 424, (9th Cir.,
978) cert. den., 442 U.S. 929 (1979)
stating "the contract seems to mean
hat Stevens will receive the pay
uthorized by statute from time to time
he performs his service"], and is a

early appropriation by Congress in consideration for his continuing service and observance of restrictions. United States v. Larionoff, 431 U.S. 864, 53 L.Ed.2d 48, 97 S.Ct. 2150 (1977). [Forfeiture of pay upon employment subject to "supervision and control" of foreign government; Hostinsky v. United States, 292 F.2d 508 (Ct.Cl. 1961)], [prohibition against dual officer status/pay; Hooper v. Hartman, 163 F.Supp. 437, aff'd (9th Cir., 1958) 274 F.2d 469 (Rear Admiral tried by court martial, when found guilty, forfeited right to earn retired pay)], and previously cited cases.

Other restrictions include: (a) reductions in pay if certain employment accepted (5 U.S.C. 5532); (b) forfeiture of pay for certain crimes (5 U.S.C. 8312); (c) forfeiture if employed by foreign government (U.S. Const. Art. I, sec. 9, Cl. 8); (d) forfeiture of pay for employment with

defense work for private firms within three years of retirement (37 U.S.C. 801(1)); (e) recall involuntarily (10 U.S.C. 3504(a)); (f) forfeiture if foreign citizenship is acquired (37 Comp.Gen. 207, 41 Comp.Gen. 715); (g) subject to UCMJ.

Thus, the sustaining of retainer pay as a "personal entitlement" and the "current earnings" characterization is crucial to federal goals and objectives, United States v. Tyler, supra; Costello v. United States, supra; 10 U.S.C. section 2771; McCarty v. McCarty, supra. Consequently, state courts are preempted from recharacterizing the pay as deferred compensation, Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947); Wissner v. Wissner, supra.

Military retired pay is paid to

the military member as a "personal entitlement" for personal services rendered to the United States Armed Forces. Wissner v. Wissner, supra; Lemly v. United States, 75 F.Supp. 248, 109 Ct.Cl. 760 (1948); McCarty v. McCarty, supra.

State courts are preempted upon a showing of (1) an expression of Congressional purpose or intent to preempt the field, (2) pervasiveness of the schema, (3) nature of the field as federal in character, and (4) the inherent need for nationwide uniformity. Congress has preempted the field and has established a pervasive schema by exercising its authority pursuant to the United States Constitution, Article I, section 8, cls. 12, 13, 14, and 16; Article VI, clause 2. Accordingly, the field is exclusively federal in character, United States v. Tarble, 80 U.S. 397, 20 L.Ed. 597 (1872), and Congress may not delegate its exclusive

authority over this purely federal and Constitutionally mandated responsibility. Knickerbocker, supra.

It is imperative to maintaining the stability of the armed forces that the consideration a member receives for his service is uniform and does not vary from state to state. Flannagan v. Flannagan, supra, destroys this stability in Washington by allowing the retroactive application of FSPA, creates diversity of application of a federal statute between the states. The only possible rationale for the Flannagan decision is that neither party had legal counsel, nor had they entered into an agreement binding themselves, a factual basis totally opposite of Petitioner's case.

Even if the FSPA were a constitutional act, which Petitioner denies, the division of such retired pay is not in accordance with "the law of the jurisdiction" [Washington]. 10 U.S.C.

1408(c)(1). If the Washington State courts define military retired pay as a "pension", an erroneous characterization, a division of that "pension" is prohibited by R.C.W. 6.15.020.

Although the state legislature attempted to specifically target military retired pay in the 1987 amendments by adding subparagraphs (2) and (3) to that statute, the last section of subparagraph (3) specifically excludes those plans exempted from ERISA in 29 U.S.C. 1003(b)(1). Military retired pay is so excluded. However, the law in effect at the time of this dissolution (1980) was the predecessor of R.C.W. 6.15.020, R.C.W. 6.16.030, which simply and absolutely forbad the division of this "pension". If the Washington courts define military retired pay as wages, the correct characterization, the designation of those future wages as the "community property" of a non-existent community, is repugnant to

R.C.W. 26.16.140, and Washington State Constitution, Article 1, sec. 2.

(c) The Court of Appeals improperly interpreted the Constitutional issue.

In ruling that the Constitutional challenge presented had been previously decided, the Court of Appeals cited Marriage of Giroux, 41 Wash.App. 315, 704 P.2d 160 (1985). Petitioner's challenge was much broader, specifically that the Former Spouses' Protection Act was unconstitutional in its entirety as an impermissible delegation of Congressional authority. The case cited by the Court of Appeals only addressed the retroactive application of the FSPA, and then only in the context of that specific case. The petitioner contends that this feeble attempt to address his Constitutional argument completely ignores the basis of his challenge, and the absolute failure of the state Supreme Court to

ddress this vexatious and critical ssue, or any issue, leaves that basic hallenge unanswered in any manner. etitioner did argue the retroactivity ssue, as he believes Giroux to be learly distinguishable from the pre- ent case as previously discussed. owever, more fundamentally, and as the rimary argument, Petitioner contended hat the FSPA in its entirety is nconstitutional, and that issue was otally ignored by the trial Court, and he appellate courts of Washington.

The Former Spouses' Protection Act s unconstitutional as a delegation of xclusive Congressional authority. learly, the raising and maintaining of he military is exclusively a function eserved by the United States Consti- ution to Congress. By virtue of the onstitutional reservation of authority o Congress, likewise, Congress may not elegate its authority.

(d) The only alleged jurisdiction over the subject matter of this action rests on an unconstitutional Federal Statute

Petitioner has steadfastly resisted and denied the legality of the division of his current wages with a former spouse, pursuant to a divorce decree, in derrogation of R.C.W. 26.16 140, and the Constitution of the United States, Article I, Section 8. He understands that the State of Washington, albeit erroneously, has determined that military retired/retainer pay is deferred compensation and is therefore classified as property, but would again assert that such division is contrary to law, and that the courts of that State therefore lack subject matter jurisdiction over the retired/ retainer pay currently being paid to Petitioner.

As subject matter jurisdiction may be asserted at any stage, Petitioner would again challenge the state courts

jurisdiction over the subject matter of this action. The FSPA, effective on February 1, 1983, created no jurisdiction over acts effected and adjudicated 3 years prior. That statute was not retroactive. Even were this Court to find that at the present time, the courts of the states have jurisdiction based upon the passage of the FSPA, those courts had no jurisdiction in 1980. The Court in McCarty, supra, restated pre-existing federal law. McCarty didn't change the law. As this Court stated in Mansell v. Mansell, 490 U.S.581, 109 S.Ct. 2023, 104 L.Ed. 2d 675 (1989), pre-existing federal law "completely pre-empted the application of state community property laws to military retirement pay", and that pre-existing federal law could only be overcome by Congress "enacting an affirmative grant of authority giving the states the power . . ." Id at 2029.

Congress attempted to do so with

the FSPA, though unconstitutional, but that attempt was made after the Decree of Dissolution in this case had been long since final, and after the single condition subsequent in the Decree had come to pass. The courts of the State of Washington had no authority prior to the passage of the FSPA, if they acquired any then. Without authority, those courts had no jurisdiction. Pre FSPA law completely pre-empted state law. McCarty, supra; Mansell, supra.

Pre-emption by the federal government, quite simply, deprives state courts of subject matter jurisdiction. McCulloch v. Maryland, 4 Wheat 316, 17 U.S. 316, 4 L.Ed. 529 (1818). If a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim of validity, and this is true even though the state action in question was taken within a sphere in which the states

could otherwise act. Free v.Bland, supra, at 666. "Specifically, a state divorce decree, like other law governing economic aspects of domestic relations, must give way to clearly conflicting federal enactments." Ridgway v. Ridgway, 454 U.S. 46, 54 , 70 L.Ed. 2d 39, 102 S.Ct 49 (1981).

CONCLUSION

The unconstitutional effects are very simple. Firstly, Congress cannot delegate to the states that authority and responsibility which belongs exclusively to Congress. They have done so with the Uniformed Services Former Spouses' Protection Act. Any attempt to equate them with the Foreign Service retirement system, the CIA retirement system or even the federal judiciary retirement system and the former spouse provisions of these systems, is simply mixing fantasy and reality. All the other systems are contributory systems,

eferred compensation systems.

Secondly, the Fourteenth Amendment f the United States Constitution pro-ides and guarantees to Petitioner that [n]o State... shall deprive any person f life, liberty, or property, without e process of law;...". The modifi-tion of the judgment is unconstitu-onal in violation of the Fourteenth endment. At the time Petitioner rried Respondent (May, 1961), and ring his tenure in the military rvice, to the time the parties parated (February, 1979), and until e Decree of Dissolution was entered ugust 14, 1980), military retired pay s the personal entitlement of the litary member, Wissner v. Wissner, pra; McCarty v. McCarty, supra.

Thirdly, the contract clause of e Constitution prohibits any court om vitiating any otherwise legal, oper, binding, and particularly a eviously adjudicated contract between

hese parties. Fourthly, no ex-post acto legislation or bills of attainder re Constitutionally permissible, nor s retrospective application of legis- ation allowed in this case.

Clearly it is not constitutionally ermissible to enact legislation in 983 which transforms conduct under- aken in 1980 into a loss of property ights. Appellant had no notice or pportunity to be heard at the time of he proposed conversion of his pay from "personal entitlement" to a "commun- y property asset".

For over one hundred years, this ourt has consistently held that notice nd opportunity to be heard in a timely nner are essential ingredients of due ocess, Pennoyer v. Neff, 95 U.S. 714, L.Ed. 565 (1877); Mullane v. Central nover Bank & Trust, 339 U.S. 306, 94 Ed. 865, 70 S.Ct. 652 (1950). In titioner's case, the giving of notice Wash- ington, some eight years after

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courts of this state lost any
isdiction over the Petitioner; to
ege that conduct which has, by
sequent federal Legislative enact-
t, even if it were proper legis-
ion, had become the basis for
rusion upon his property rights, is
ugnant to the United States Consti-
ion, Fourteenth Amendment.

The conclusion is inescapable.
courts below should be reversed for
r reasons. Firstly, the very
mise upon which the sought after
rification/modification was based,
upon a wholly unconstitutional Act
the United States Congress. This
rt should so find and reverse on
t basis. Secondly, the courts below
uld be reversed on the basis that
y have, by decision, taken the
rent and future wages of the
itioner for the benefit of another,
his spouse, in violation of the
rteenth Amendment of the Constitu-

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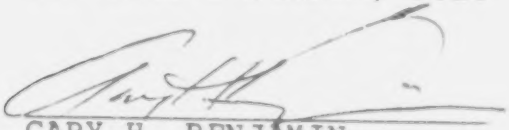
n of the United States, and in lation of R.C.W. 6.15.020 (formerly .W. 6.16.030) and R.C.W. 26.16.140. rdly, the courts below should be ersed on the basis that the courts ow have rewritten a final and ding decree, a decree that was mbiguous and all encompassing, a rite that the courts are not per- ted to do. Fourthly, the courts ow should be reversed on the basis by decision, the courts below ied a statute enacted in 1983 eit unconstitutional) to a final sion of the courts entered in 1980, such retrospective application is idden by both the state and federal titutions.

Based upon the foregoing law and ment, Petitioner respectfully est this Court to reverse the sion of the Washington State eme Court, with instruction to nd this matter to dismiss these

proceedings, and restore the parties to the position of the final, unambiguous and final decree of August 15, 1980.

Respectfully Submitted this 30th day of August, 1991.

BENJAMIN & PERREY, P.S.



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